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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 430

THE FLYING TIGER LINE, INC.,
Petitioner,

—against—

PHILIPPINE AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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This memorandum is submitted on behalf of the petitioner Flying Tiger in reply to the answering brief of respondent, Philippine. This brief is necessitated as, in certain instances, Philippine has failed in its answering brief to meet directly the issues raised in our main brief.

POINT I

The right to contract should not be impaired by a new doctrine of law alien to American jurisprudence.

Philippine asserts (answering brief, page 7) that the Interline Agreement made with Flying Tiger covered both import and export shipments. In addition, Philippine says (answering brief, page 10) that it was agreed [Article VII (a)] that Flying Tiger's liability as to both import and export shipments should be only that stated on its airbill and in its tariff.

Philippine now argues (answering brief, page 11) that quite aside from a right of contractual indemnity, it has a further right of indemnity arising by operation of law based on primary and secondary negligence theories. This is contrary to all established legal principles.

The parties to the Interline Agreement made a very extensive contract that completely sets forth their respective liabilities. If the agreed upon liabilities can be modified and changed "by operation of law" based on "primary and secondary negligence" theories there is an impairment of the right to contract. In addition, if the responsibilities of the parties can be changed, despite the terms and conditions of the written contract, as is being attempted herein by the Court of Appeals, the law of contracts of this nation will be in a most chaotic state.

POINT II

Phillipine did not comply with the contract and should not be allowed to recover over against Flying Tiger.

As Philippine has failed in its answering brief to state the most important fact concerning the issuance of its own airbill purporting to cover the shipment as a whole from New York to Hong Kong it is appropriate to emphasize here the apparent oversight.

Under the Interline Agreement (FT, 128a) Philippine was to prepare its air waybill only from the Philippine Airport of Export, San Francisco (FT, 4a) to the foreign destination. Philippine, however, in violation of the contract with Flying Tiger, issued an airbill (Ph, 13a) binding itself for transportation of the shipment from New York to Hong Kong.

There was no authorization in the Interline Agreement for Philippine to issue a bill from New York to Hong Kong. Had Philippine properly issued its bill from San Francisco to Hong Kong and only contracted with the shipper for such a carriage it would not have been liable for the loss occurring between New York and San Francisco.

It would appear that Philippine is deliberately avoiding the issue that it violated the Interline Agreement. Philippine has no possible argument that it duly complied with all material provisions of the contract and therefore should not be allowed to recover over on same against Flying Tiger.

Philippine states (answering brief, page 9) that Article VI (a) of the Interline Agreement provides that where Flying Tiger does not issue a Philippine air waybill, Flying Tiger is bound to tender the shipment to Philippine with a Flying Tiger airbill containing specific provisions. However, Philippine fails to consider Article II (d) of said agreement (FT. 128a) which provides that when such export shipments are tendered it will accept same together with associated documents and prepare its air waybill from its Airport of Export to the proper foreign destination.

Had Philippine waited for a proper tender by Flying Tiger, it would have ascertained that Flying Tiger was carrying the shipment without any declared value. Philippine, however, breached the Interline Agreement by going ahead and issuing its own air waybill to shipper Orlove with a declared value before any tender was made by Flying Tiger and therefore cannot recover over against Flying Tiger under the contract.

Philippine continues its insistence, by mere assertion, that Flying Tiger was obliged to make certain endorsements on the airbill including that it was subject to the Warsaw Convention. It must be noted, however, that the Flying Tiger tariff related only to domestic shipments and contained only the limitation of liability warranted by domestic law (FT, 142a); the Philippine tariff contained only that provided for by the Warsaw Convention (Ph, 17a). Likewise, the Philippine air waybill did not contain the limitation which Flying Tiger was permitted to impose, but did have the limitation which Flying Tiger was

not permitted to exact. This demonstrates the absolute necessity, if a through airbill were to be issued, that both parties file concurring tariffs. Unless and until that was done, Flying Tiger could neither have issued a Philippine through air waybill, nor issue its own to cover a foreign shipment. Flying Tiger could only pursue the course which it did, leaving it to each carrier to issue its own waybill for its own portion of the transportation.

POINT III

Philippine errs in stating that irrespective of the Interline Agreement, any liability of Philippine to Orlove must be borne by Flying Tiger.

The first point of the answering brief of Philippine requires but little comment. The authorities cited are inapplicable; they deal solely with the law pertaining to cases where a waybill or bill of lading on a through route is issued by the initial carrier. Here there was no through route, and could not be, as Philippine did not have a filed tariff of through rates from New York. *Rosario Min. Co.* v. *Riddle Airlines*, 3 App. Div. 2d 457, aff'd., no op. 4 N. Y. 2d 755. In addition, Flying Tiger did not issue a through air waybill and could not have done so as it did not have any tariff in effect covering any movement beyond the United States.

Even if the cases cited were otherwise applicable, the quotation from the *Oregon-Washington* case shows on its face its inaptness to the present suit. It merely sets forth the "rule * * * in the absence of statute or

special contract." Here there was such special contract: the one between Orlove and Philippine contained in its air waybill by which it bound itself unconditionally to accept the goods for transportation from New York to Hong Kong and to deliver them to the consignee there (Ph, 12a). (See *Wiener* v. *Compagnie Generale*, 61 F. 2d 893, 2nd Circ.).

In short, we repeat, that Philippine's loss was occasioned solely and exclusively by its own assumption of liability in the through air waybill it issued, uncalled for by the Interline Agreement and in violation of law and by the improper procedure which it followed, pursuant to its own dictates.

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the judgment of the Court of Appeals herein.

Respectfully submitted,

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